

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

DONNIE RAY MATTHEWS,

Petitioner,

vs.

DORA B. SCHIRIRO, et al.,

Respondents.

No. CV 04-320-TUC-CKJ

ORDER

Pending before the Court is Petitioner's Petition for Writ of Habeas Corpus by a Person in State Custody Pursuant to 28 U.S.C. § 2254. Respondents have filed an Answer and Petitioner has filed a Reply. Also pending before the Court are Petitioner's Motion for Hearing [Doc. # 19], Motion to Appoint Counsel [Doc. # 19], Motion for Discovery [Doc. # 27], Motion to Request Leave to File a Second Supplemental Pleading [Doc. # 28], and a Motion to Request Leave to File a Traverse [Doc. # 36].

Factual and Procedural Background

On October 29, 1992, Petitioner Donnie Ray Matthews ("Matthews") was sentenced to concurrent prison terms, the longest of which was twenty (20) years for assault, aggravated assault, and kidnapping. Matthews apparently filed a pro per document stating he waived his appeal rights; Matthews did not appeal at that time. Respondents' Exhibit FF.

On or about November 1, 1993, the Pima County Superior Court dismissed

1 Matthews' pro per petition for state habeas relief¹ with notice that Matthew should confer
2 with his attorney regarding appeal rights and post-conviction rights.

3 On or about November 29, 1993², Matthews filed a second Petition for Writ of
4 Habeas Corpus (False Imprisonment). On or about December 1, 1993, Matthews filed
5 an Order for Issuance, Service, and Return to Writ and an Order for Immediate
6 Production of Prisoner/and in the Alternative to Discharge Prisoner, Donnelle Ray
7 Matthews, from Unlawful Restraint. These documents requested Matthews' presence at
8 a hearing on the issues and sought relief on the grounds that Detective Matthew Wayne
9 Griffis committed perjury and had no personal knowledge when he testified before the
10 grand jury, Matthews was not provided with a preliminary hearing, the grand jury was
11 improperly drawn and sanctioned, the prosecutor engaged in *ex parte* communications,
12 Detective Cathy Rau committed perjury and had no personal knowledge when she
13 testified before the grand jury, prosecutorial misconduct, alleged victim Barbara Pollard³
14 did not testify against him, Justice of the Peace S. Hayes acted without jurisdiction and
15 violated the canons of the Code of Judicial Conduct (expedited the matter to the Pima
16 County Superior Court), Justice of the Peace Weber acted without jurisdiction and
17 violated the canons of the Code of Judicial Conduct (did not conduct preliminary
18 hearing), Judge James C. Carruth violated the canons of the Code of Judicial Conduct by
19 violating Matthews' right to a speedy trial, Judge Carruth denied Matthews' petition for
20 writ of habeas corpus without the appearance of a court reporter, false imprisonment
21

22
23 ¹Matthews' November 29, 1993, Petition for Writ of Habeas Corpus indicates that a
24 petition was filed on September 13, 1993, and a petition was filed on October 22, 1993.
Respondents' Exhibit D, p. 13 of 22.

25 ²At times the Court refers to filing dates that are file-stamped on documents; at other
26 times the Court refers to the date a document was signed by Matthews.

27 ³At different points in the documents, the person is referred to as Barbara Pollard,
28 Barbara Polland, and Barbara Rolland. Grand jury testimony cited by Matthews indicates
that the name is Barbara Pollard; thus, the Court will use that name in this Order.

1 (based on unconstitutional entry and arrest and no preliminary hearing), Fourth
2 Amendment Violations, and Matthews was not timely brought before a magistrate.
3 Matthews also refers to waiving his right to appeal without being aware of what he was
4 doing. The record does not show a ruling on this petition.

5 On February 10, 1994, Matthew filed a federal habeas petition. On April 10, 1994,
6 that petition was dismissed without prejudice to allow Matthews to present his claims in
7 the state courts and to properly exhaust those claims.

8 On or about October 24, 1994, Matthews filed a Notice of Post-Conviction Relief
9 in the Pima County Superior Court. Matthews' request for post-conviction relief raised
10 the issues of unlawful entry to arrest and unlawful arrest (Fourth Amendment violations),
11 the grand jury was improperly drawn and sanctioned, infringement of Matthews' rights
12 against self-incrimination, prosecutorial misconduct, denial of Matthews' right to a
13 speedy trial, vindictive prosecution, use of perjured testimony, lack of jurisdiction,
14 unconstitutional amendment of the indictment, newly discovered evidence, including that
15 the alleged victim Barbara Pollard was actually Barbara Davis (who had an extensive
16 criminal history of alcohol abuse and forgery charges), sham representation by the Pima
17 County Public Defender's Office, Justice of the Peace did not conduct a preliminary
18 hearing and expedited the matter to the Pima County Superior Court, *ex parte*
19 communications between prosecutor and defense attorney, Matthews was never arrested
20 or booked for the charge of kidnapping, ineffective assistance of trial counsel, abuse of
21 discretion by Judge Carruth, and failure to appeal was without fault of Matthews. On
22 June 13, 1995, the trial court denied relief on three grounds: untimeliness, preclusion,
23 and the petition's contents were baseless. Matthews petitioned for review to the Court of
24 Appeals of Arizona. The Court of Appeals determined that the summary dismissal of the
25 petition was appropriate and granted review but denied relief.⁴ On or about January 24,
26

27 ⁴The Court notes that Respondents' Exhibit M only includes every-other page of the
28 Arizona Court of Appeals' decision.

1 1996, Matthews filed a Notice with a Motion to Consolidate Special Actions to Post-
2 Conviction Application and Amendment to Petition for Reconsideration. On February
3 8, 1996, the Arizona Court of Appeals deemed this to be a motion for reconsideration and
4 denied relief. On February 15, 1996, Matthews petitioned for special action review of the
5 Arizona Court of Appeals' decision to the Arizona Court of Appeals. On February 23,
6 1996, the Court of Appeals dismissed the special action for lack of jurisdiction.
7 Matthews did not petition for review to the Supreme Court of Arizona and the mandate
8 appears to have been issued on March 7, 1996.

9 On or about April 4, 1996, Matthews filed another special action in the Arizona
10 Court of Appeals. On May 9, 1996, the special action was dismissed for lack of
11 jurisdiction because Matthews was not seeking special action from an order of the
12 superior court.

13 On May 31, 1996, Matthews filed a second Notice of Post-Conviction Relief, a
14 request for special action relief from the trial court, and other miscellaneous documents.
15 On July 1, 1996, and July 5, 1996, Matthews filed additional miscellaneous documents.
16 On August 7, 1996, the trial court, referring to "a voluminous amount of 'legal
17 pleadings'" and "largely unintelligible papers[.]" denied relief for the same reasons as set
18 forth in the June 13, 1995, order and the December 19, 1995, Arizona Court of Appeals'
19 opinion. Respondents' Exhibit X. On September 9, 1996, Matthews sought special action
20 relief from the August 7, 1996, order. The Arizona Court of Appeals declined to accept
21 jurisdiction.

22 In February 1997, Matthews filed a third state habeas petition. On March 6, 1997,
23 the action was dismissed for failure to state claims upon which Matthews was entitled to
24 relief.

25 On April 30, 1997, Matthews filed a fourth state habeas petition and miscellaneous
26 documents. On May 23, 1997, the trial court treated the petition as a Petition for Post-
27 Conviction Relief and dismissed it for the same reasons as set forth in the trial court's
28 June 3, 1995, August 7, 1996, and March 6, 1997, orders and the Arizona Court of

1 Appeals' December 19, 1995, opinion. After Matthews filed a request for appointment
2 of counsel in habeas corpus proceedings, the trial court, on June 26, 1997, reaffirmed its
3 May 23, 1997, order and denied relief.

4 Matthews appears to have filed a fifth state habeas petition and, on July 29, 1997,
5 the trial court dismissed the petition for failing to state a claim upon which relief can be
6 granted and for advancing the same issues that had previously been disposed of by the
7 court.

8 Matthews appears to have filed a sixth state habeas petition and, on October 9,
9 1997, the trial court dismissed the petition because Matthews had not raised any new
10 claims in the petition.

11 On or about April 30, 1998, Matthews filed another Notice of Post-Conviction
12 Relief. On February 10, 1999, the trial court denied relief because Matthews had not
13 raised an issue that was within the scope of Rule 32, Ariz.R.Crim.P, Arizona's post-
14 conviction relief rule.

15 On June 12, 1998, Matthews filed a petition for special action. On September 9,
16 1998, the Arizona Court of Appeals declined to accept jurisdiction.

17 Matthews apparently filed another petition for special action; on November
18 18, 1998, the Arizona Court of Appeals found the petition to be a frivolous filing, like the
19 seven previous filings that were deemed as frivolous with jurisdiction declined, and
20 ordered Matthews to file no further special actions without first moving for written
21 permission to do so.

22 On or about August 7, 2000, Matthews filed a Motion to Vacate Judgment. On
23 August 18, 2000, and August 31, 2000, the motion was denied as untimely and without
24 factual or legal basis, and because the issues were identical to those previously dismissed.

25 On or about August 11, 2000, Matthews filed his first direct review Notice of
26 Appeal. On October 9, 2000, Matthews petitioned for review in Arizona Court of
27 Appeals of the trial court's August 18, 2000, order, Matthews' September 18, 2000,
28 special action, and the trial court's June 13, 1995, denial of post-conviction relief. These

1 documents were filed under Matthews' appeal case number. On October 23, 2000, the
2 Arizona Court of Appeals granted the State's motion to dismiss (as untimely and without
3 jurisdiction).

4 Matthews appears to have filed a special action petition in the Pima County
5 Superior Court. On October 3, 2000, the trial court denied the petition because Matthews
6 had provided no additional law or facts that would justify granting the requested relief.

7 On August 13, 2001, Matthews filed a Nunc Pro Tunc Notice of Post-Conviction
8 Relief and accompanying documents. On October 24, 2001, the trial court summarily
9 denied relief because Matthews had failed to raise any material issue of fact or law.

10 On September 13, 2001, Matthews filed a petition for special action in the Arizona
11 Court of Appeals. On September 18, 2001, the Arizona Court of Appeals dismissed the
12 petition with leave to re-file in conformity with the Arizona Rules of Procedure for
13 Special Actions 7. The mandate was issued on October 26, 2001.

14 On September 25, 2001, Matthews filed another petition for special action. The
15 Arizona Court of Appeals declined to accept jurisdiction and, on April 1, 2002, the
16 Supreme Court of Arizona denied review.

17 On September 9, 2003, the Arizona Court of Appeals declined to accept
18 jurisdiction of another petition for special action. This petition is not included as part of
19 the record.

20 In March 2004, Matthews filed a motion for an extension of time to file a petition
21 for post-conviction relief, a motion for change of judge, and another state habeas petition.
22 On March 24, 2004, the trial court granted an extension of time, denied the motion for
23 change of judge, and found that the claims in the state habeas petition had already been
24 adjudicated and did not provide grounds for relief. Matthews filed a petition for special
25 action and, on April 27, 2004, the Arizona Court of Appeals declined to accept
26 jurisdiction. The mandate was issued on July 22, 2004.

27 On or about June 22, 2004, Matthews filed a Petition for Writ of Habeas Corpus
28 by a Person in State Custody Pursuant to 28 U.S.C. § 2254 in this Court.

1 In his Petition, Matthews sets forth four claims for relief. Matthews first asserts
2 that he was falsely imprisoned without legal process from the time of his arrest to the time
3 of sentence. In making this claim, Matthews asserts that he was unlawfully arrested,
4 unlawful grand jury practices were employed, Matthews was unlawfully stripped of his
5 constitutional rights to a preliminary hearing, and a twelve year old conviction was
6 unlawfully used to aggravate his sentence. Matthews' second claim asserts that he was
7 convicted on false and fabricated evidence. Matthews asserts in his third claim that he
8 was denied legal counsel. Matthews asserts that he was not provided the assistance of an
9 attorney at his arraignment and that appointed counsel Harriette Levitt and Geoffrey
10 Cheadle provided ineffective assistance of counsel. Matthews further asserts that he was
11 denied effective assistance of counsel during appeal and post-conviction relief
12 proceedings. In his fourth claim, Matthews asserts that he was denied a right to an equal
13 opportunity to the courts and to appeal by denying Matthews transcripts and records and
14 by denying Matthews the appointment of counsel. On or about June 30, 2004, Matthews
15 filed a Supplement to Petition for Writ of Habeas Corpus, accompanying affidavit, and
16 exhibits. On or about January 28, 2005, Matthew filed a Supplement to Petition for Writ
17 of Habeas Corpus in which he asserts a claim that the prosecution failed to disclose
18 exculpatory evidence to the defense.

19 On or about December 10, 2004, Matthews filed a Request for Evidentiary Hearing
20 and to Appoint Legal Counsel. After setting forth arguments to support his claims for
21 habeas relief, Matthews indicated that his request would be supplemented. On January
22 18, 2005, Matthews filed a Supplemental to Request for Evidentiary Hearing and to
23 Appoint Legal Counsel. This document also set forth arguments to support Matthews'
24 claims for habeas relief. A response has not been filed.

25 On or about February 3, 2005, Matthews filed a Request for Discovery. Matthews
26 supplemented this request on or about February 16, 2005.

27 On or about February 16, 2005, Matthews filed a Motion to Request Leave to File
28 a Second Supplemental Pleading. On or about February 26, 2005, Matthews filed a

1 Motion to Request Leave to File a Traverse and an accompanying Reply/Traverse.

2 On February 18, 2005, Respondents filed an Answer.

3
4 *Request for Evidentiary Hearing and to Appoint Legal Counsel*

5 A determination of whether an evidentiary hearing is needed shall be made upon
6 review of the pleadings, transcripts, and record. Rule 8(a), Rules Governing Habeas
7 Corpus Cases Under § 2254. The Court having determined, *infra*, that the habeas petition
8 is untimely, an evidentiary hearing is not needed.

9 The right to counsel provisions of the Sixth Amendment do not apply in habeas
10 corpus proceedings. *See Chaney v. Lewis*, 801 F.2d 1191, 1196 (9th Cir.1986), *cert.*
11 *denied*, 481 U.S. 1023 (1987). Nonetheless, under 18 U.S.C. § 3006A(a)(2)(B) a district
12 court has discretion, when "the interests of justice so require," to appoint counsel for an
13 indigent defendant seeking relief under section 28 U.S.C. § 2254. In determining whether
14 the interests of justice require the appointment of counsel, the Court considers the
15 likelihood of success on the merits and the ability of Matthews to articulate his claims *pro*
16 *se*. *Weygandt v. Look*, 718 F.2d 952, 954 (9th Cir.1983).

17 Matthews has raised four grounds in his Amended Petition: (1) the conviction was
18 obtained by the use of evidence gained pursuant to an unlawful arrest; failure to provide
19 a full and fair hearing on the Fourth Amendment claims; (2) Matthews was falsely
20 imprisoned in violation of the Fourth, Fifth, Sixth, and Fourteenth Amendments; (3) the
21 conviction was obtained by action of a grand jury that which was unconstitutionally
22 selected and impaneled in violation of the Fifth, Sixth, and Fourteenth Amendments, and;
23 (4) Matthews was denied effective assistance of counsel in violation of the Sixth and
24 Fourteenth Amendments. In making his claims, Matthews has set forth the factual
25 allegations and legal arguments to support his claims. Petitioner has effectively
26 articulated his claims *pro se*. Moreover, as discussed *infra*, the Court does not find there
27 is a likelihood of success of the merits because the habeas petition is untimely. The
28 Court finds the interests of justice do not require the appointment of counsel.

1 *Motion for Leave to Conduct Discovery*

2 Matthews has requested this Court to allow him to conduct discovery. Matthews
3 has not shown good cause for this Court to authorize discovery. Rule 6, Rules Governing
4 Habeas Corpus Cases Under § 2254. Moreover, this Court has determined, *infra*, that the
5 habeas petition is untimely; discovery is not warranted to proceed with an untimely
6 petition.

7
8 *Motion for Leave to File Traverse*

9 Matthews has filed a Motion to Request Leave to File a Second Supplemental
10 Pleading and a Motion to Request Leave to File a Traverse. In submitting his Motion to
11 Request Leave to File a Traverse, Matthews has submitted his Traverse. Respondents do
12 not oppose the motion. The Court accepts Matthews' Traverse.

13
14 *Statute of Limitations*

15 Under the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), a
16 state prisoner must generally file a petition for writ of habeas corpus within one year
17 from the date upon which his judgment became final or the expiration of time for seeking
18 such review. *See* 28 U.S.C. § 2244(d)(1)(A). Matthews did not appeal his October 29,
19 1992, conviction and sentence within the 20 days allotted under Rule 31.3(a),
20 Ariz.R.Crim.P. Matthews' judgment of conviction, therefore, became final when the 20-
21 day period during which Matthews could have, but did not, file a notice of appeal to the
22 Arizona Court of Appeals. *See generally Bowen v. Roe*, 188 F.3d 1157, 1158-59 (9th Cir.
23 1999). Matthews' federal limitations period began running on AEDPA's effective date,
24 April 24, 1996, giving [Matthews] one year from that date (in the absence of tolling) to
25 file a federal habeas petition." *Carey v. Saffold*, 536 U.S. 214, 220-21, 122 S.Ct. 2134,
26 153 L.Ed.2d 260 (2002).

1 *Statutory Tolling of Limitations Period*

2 The limitations period is statutorily tolled during the time in which a "properly
3 filed application for State post-conviction or other collateral review with respect to the
4 pertinent judgment or claim is pending" in the state courts. 28 U.S.C. § 2244(d)(2);
5 *Carey*.

6 A request for post-conviction relief is "properly filed" when its "delivery and
7 acceptance are in compliance with the applicable laws and rules governing filings" such
8 as "the form of the document, the time limits upon its delivery, and the court and office
9 in which it must be lodged, and the requisite filing fee." *Artuz v. Bennett*, 531 U.S. 4, 8-9,
10 121 S.Ct. 361, 148 L.Ed.2d 213 (2000). As long as a state procedure for filing a post-
11 conviction relief petition exists, "the petition is pending while the state court considers
12 it, whether the decision is ultimately on the merits or on procedural grounds." *Chavis v.*
13 *LeMarque*, 382 F.3d 921, 925 (9th Cir. 2004). In *Carey*, the United States Supreme Court
14 held the statute of limitations is tolled where a petitioner is properly pursuing
15 post-conviction relief, and the period is tolled during the intervals between one state
16 court's disposition of a habeas petition and the filing of a habeas petition at the next level
17 of the state court system. 536 U.S. at 214-15, 122 S.Ct. at 2135-36; *see also Nino v.*
18 *Galaza*, 183 F.3d 1003, 1006 (9th Cir.1999), *cert. denied*, 529 U.S. 1104, 120 S.Ct. 1846,
19 146 L.Ed.2d 787 (2000); *Welch v. Newland*, 267 F.3d 1013, 1016 (9th Cir.2001) ("tolled
20 period includes intervals between the disposition of a state court petition and the filing
21 of a subsequent petition at the next state appellate level"); *Patterson v. Stewart*, 251 F.3d
22 1243, 1247 (9th Cir. 2001) (stating that the "AEDPA's one-year grace period is tolled
23 during the pendency of properly filed state petitions challenging the judgment or claim
24 at issue."); *cf. Dils v. Small*, 260 F.3d 984, 986 (9th Cir. 2001) (Court found no tolling
25 between consecutive filings at the same level).

26 The Ninth Circuit applies a two-part test to determine whether a habeas petitioner
27 is entitled to statutory tolling of the period between the denial of a first post-conviction
28 relief petition "and the commencement of his next series of petitions":

1 First, we ask whether the petitioner's subsequent petitions are limited to an
 2 elaboration of the facts relating to the claims in the first petition. If not, these
 3 petitions constitute a "new round" and the gap between the rounds is not tolled.
 4 *Biggs v. Duncan*, 339 F.3d 1045 (9th Cir. 2003). But if the petitioner simply
 5 attempted to correct the deficiencies, then the petitioner is still making "proper use
 6 of state court procedures," *Nino v. Galaza*, 183 F.3d 1003, 1006 (9th Cir. 1999),
 7 and his application is still "pending" for tolling purposes. See *Carey v. Saffold*,
 8 536 U.S. 214, 220, 122 S.Ct. 2134, 153 L.Ed.2d 260 (2002) ("until the application
 9 has achieved final resolution through the State's post-conviction procedures, by
 10 definition it remains 'pending'"). We thus construe the new petitions as part of the
 11 first "full round" of collateral review. *Carey*, 536 U.S. at 222, 122 S.Ct. 2134. We
 12 then ask whether they were ultimately denied on the merits or deemed untimely.
 13 *Id.* In the former event, the time gap between the petitions is tolled; in the latter
 14 event it is not.

15 *King v. Roe*, 340 F.3d 821, 823 (9th Cir. 2003) (second series of petitions made no
 16 attempt to correct prior petition; second series of petitions were treated as a separate
 17 round).

18 Presenting federal claims in a state habeas corpus petition does not constitute "fair
 19 presentation" to the state courts under Arizona law. *Roettgen v. Copeland*, 33 F.3d 36,
 20 38 (9th Cir. 1994). The Ninth Circuit has rejected the proposition that filing a state
 21 habeas petition constitutes a fair presentation of a federal claim "[b]ecause Rule 32 now
 22 explicitly provides a post-conviction remedy for jurisdictional challenges, and because
 23 the Arizona legislature and the courts have shown a clear preference that claims
 24 cognizable under Rule 32 be presented in a Rule 32 petition for post-conviction relief
 25 rather than a petition for habeas corpus[.]" *Id.*, citing *Castille v. Peoples*, 489 U.S. 346,
 26 351, 109 S.Ct. 1056, 103 L.Ed.2d 380 (1989).⁵

27 Similarly, the "state habeas petition is like Arizona's special action petition; it is
 28 solely a method for obtaining extraordinary relief." *Rivera-Sanchez v. Crist*, 832 F.Supp.
 29 276, 281 (D.Ariz. 1993), *citations and internal quotations omitted* ("habeas corpus is not
 30 intended to serve as a means for a defendant to obtain successive appeals, and all issues

31 ⁵In Arizona, post-conviction relief procedures have been consolidated into one
 32 comprehensive post-conviction remedy. Rule 32, Ariz.R.Crim.P., Comment. A prisoner
 33 seeking to attack the constitutionality of his conviction or sentence must do so by way of a
 34 direct review appeal or a petition for post-conviction relief. Rules 31 and 32, Ariz.R.Crim.P.;
 35 *State v. Sandon*, 161 Ariz. 157, 158, 777 P.2d 220, 221 (1989).

1 which were raised by a defendant on appeal or which might have been raised on appeal
2 are precluded"). Therefore, a special action petition is not a "properly filed application
3 for State post-conviction or other collateral review with respect to the pertinent judgment
4 or claim [that] is pending" in the state courts under § 2244(d)(2) and *Carey*, 536 U.S. at
5 220-21.

6 Arguably, Matthews' November 29, 1993, Petition for Writ of Habeas Corpus
7 (False Imprisonment) was pending on April 24, 1996, the beginning of Matthews' one-
8 year statute of limitations period – the record does not show that this Petition has ever
9 been specifically ruled upon. However, Matthews' presentation of federal claims in a
10 state habeas corpus petition did not constitute a "fair presentation" to the state courts
11 under Arizona law. *Roettgen*. This petition, therefore, did not constitute a properly filed
12 application for State post-conviction or other collateral review. *See e.g., Castille*, 489
13 U.S. at 351 (denying "fair presentation" when "the claim has been presented for the first
14 and only time in a procedural context in which its merits will not be considered unless
15 there are special and important reasons therefore"). Moreover, Matthews' first Petition
16 for Post-Conviction Relief included the claims set forth in the November 29, 1993,
17 petition. The trial court's June 13, 1995, denial of Matthews' petition for post-conviction
18 relief and the appellate review of that denial, therefore, resolved all of the pre-judgment
19 issues of the November 29, 1993, petition. This action did not toll the AEDPA's statute
20 of limitations.

21 On April 24, 1996, a petition for special action (filed on April 4, 1996) was
22 pending. On May 9, 1996, the special action was dismissed for lack of jurisdiction by the
23 Arizona Court of Appeals because Matthews was not seeking special action relief from
24 an order of the superior court. This petition did not constitute a properly filed application
25 for State post-conviction or other collateral review. *See e.g., Rivera-Sanchez* and
26 *Castille*. The statute of limitations was not tolled while this action was pending.

27 On May 31, 1996, July 1, 1996, and July 5, 1996, Matthews filed a second Notice
28 of Post-Conviction Relief and other miscellaneous documents. On August 7, 1996, the

1 trial court denied relief for the same reasons as set forth in the June 13, 1995, order and
2 the December 19, 1995, Arizona Court of Appeals' opinion. The June 13, 1995, order
3 denied relief on the grounds that the petition was untimely, the majority of the claims
4 were precluded under Rule 32, Ariz.R.Crim.P., and the petition's contents were baseless.
5 The Arizona Court of Appeals' opinion concurred with the trial court's assessment of the
6 claims and the summary dismissal of the petition. On September 9, 1996, Matthews
7 sought special action relief from the August 7, 1996, order. The Arizona Court of
8 Appeals declined to accept jurisdiction. Because the trial court rejected Matthews'
9 second petition for post-conviction relief on timeliness grounds, the statute of limitations
10 was not tolled during this period. *King*, 340 F.3d at 823; *Chavis*, 382 F.3d at 927; *Welch*,
11 350 F.3d at 1081-84; *Delhomme v. Ramirez*, 340 F.3d 817, 820-21 (9th Cir. 2003); *Biggs*,
12 339 F.3d at 1048.

13 In February 1997, Matthews filed another state habeas petition. On March 6, 1997,
14 the trial court found that Matthews' documentation was basically indistinguishable from
15 Matthews' previous filings and the action was summarily dismissed for failure to state
16 claims upon which Matthews was entitled to relief. The presentation of the claims in a
17 state habeas corpus petition in Arizona does not constitute "fair presentation". *Roettgen*,
18 33 F.3d at 38. Indeed, the claims were a repetition of prior filing rather than an
19 elaboration of facts relating to claims in a prior petition. *King*, 340 F.3d at 823. The
20 statute of limitations was not tolled during this period.

21
22 *Equitable Tolling of Limitations Period*

23 Similarly, Matthews has failed to establish any period of equitable tolling during
24 this time period. *Gaston v. Palmer*, 2005 WL 1803261 (9th Cir. 8/2/2005) (habeas
25 petitioner has the burden to show that equitable tolling is appropriate). Equitable tolling
26 is not available in most cases, "as extensions of time will only be granted if extraordinary
27 circumstances beyond a prisoner's control make it impossible to file a petition on time."
28 *Id.* (citations and internal quotation marks omitted); *Miranda v. Castro*, 292 F.3d 1063,

1 1066 (9th Cir. 2002) ("the threshold necessary to trigger equitable tolling [under the
2 AEDPA] is very high, lest the exceptions swallow the rule").

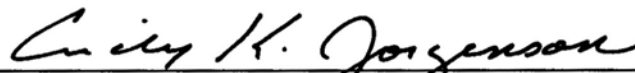
3
4 *Conclusion*

5 Matthews' limitations period to file a federal habeas petition began running on the
6 AEDPA's effective date, April 24, 1996. Matthews is not entitled to statutory or equitable
7 tolling through April 24, 1997. On April 24, 1997, therefore, Matthews' one-year statute
8 of limitations within which to file a federal habeas petition expired. Matthews did not file
9 the instant federal habeas petition until June 22, 2004. This habeas action is time-barred.
10 The action will be dismissed.

11 Accordingly, IT IS ORDERED:

- 12 1. The Motion for Hearing [Doc. # 19] is DENIED;
- 13 2. The Motion to Appoint Counsel [Doc. # 19] is DENIED;
- 14 3. The Motion for Discovery [Doc. # 27] is DENIED;
- 15 4. The Motion to Request Leave to File a Second Supplemental Pleading [Doc.
16 # 28] is GRANTED;
- 17 5. The Motion to Request Leave to File a Traverse [Doc. # 36] is GRANTED;
- 18 6. Matthews' Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254
19 is DENIED;
- 20 7. This matter is DISMISSED with prejudice, and;
- 21 8. The Clerk of the Court shall enter judgment and shall then close its file in
22 this matter.

23 DATED this 22nd day of September, 2005.

24
25 

26 Cindy K. Jorgenson
27 United States District Judge
28